RECENT DECISIONS.

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APPEAL AND ERROR—MOOT CASES—*Res Adjudicata.*—The plaintiff sued his tenant for unlawful detainer. While the appeal was pending, the defendant vacated the property. *Held,* the appeal will not be dismissed, because the question of the rightfulness of the defendant's possession will affect the amount of damages, which may be claimed in a subsequent action. *Kaufman* v. *Mastin* (W. Va. 1909) 66 S. E. 92.

It is a fundamental principle that a court will not pass upon a moot case. For this reason, if while an appeal is pending, the situation is changed so that the judgment is unnecessary or can be of no practical benefit to the parties, the court will dismiss the appeal, *Mills* v. *Green* (1895) 159 U. S. 651, even though costs are involved, *In re Kaeppler* (1898) 7 N. D. 307, and will not decide the question merely to lay down a rule for future guidance. *State* v. *Napton* (1891) 10 Mont. 369. This is the practice where the time for the remedy has passed, as in litigation over title to office the term of which has expired, *Robinson* v. *State* (1895) 87 Tex. 562, and in election cases after the election has been held, *People* v. *Rose* (1898) 81 Ill. App. 387, where the act sought has been performed, as in mandamus cases, *State* v. *Christopher* (1903) 32 Wash. 59, and in cases involving the possession of property where the defendant has surrendered it to the plaintiff, *Russell* v. *Campbell* (1893) 112 N. C. 404; and where the parties themselves have by agreement settled the controversy. *Dakota Co.* v. *Glidden* (1884) 113 U. S. 222. In one jurisdiction, however, the courts will pass upon an election case even after the election has been held, if the public interest is involved. *Matter of Cuddeback* (N. Y. 1896) 3 App. Div. 103. It has also been held that an appeal will not be dismissed where the judgment may constitute *res adjudicata* in another suit, as where one joint debtor appealed against a judgment which had been paid by a co-obligor because his liability would be *res adjudicata* in a suit for contribution, *Ferguson* v. *Millender* (1889) 32 W. Va. 30; or in an action over title to office if the judgment will determine the plaintiff's right to salary. *McClelland* v. *Erwin* (1906) 16 Okla. 612. The decision in the principal case may be upheld on the ground that the plaintiff's right will be *res adjudicata* in a suit for damages.

BANKS AND BANKING—TRUST ACCOUNTS—LIABILITY FOR TRUSTEE'S CONVERSION.—Plaintiff's treasurer, Van Voorhis, being authorized to draw checks for the plaintiff's business, drew checks on the plaintiff's depository bank, deposited them in the defendant bank to his personal account, and subsequently withdrew his total deposits. *Held,* one judge dissenting, the checks being signed by Van Voorhis as treasurer, the defendant had such notice as to put it on inquiry as to his authority, and if reasonable inquiry would show the transaction to be unauthorized, the defendant is liable for the plaintiff's loss. *Havana Central R. R.* v. *Knickerbocker Trust Co.* (1909) 42 N. Y. Law Jour. No. 68.

When a deposit is made in a bank the relation of debtor and creditor is established between the bank and the depositor with the usual obligation to pay. *Rhineheart* v. *New Madrid Banking Co.* (1903) 99 Mo. App. 381. It is generally established, however, that one, who

with knowledge aids a fiduciary in the breach of his trust is liable to the *cestui que trust, Third National Bank of Baltimore* v. *Lange* (1878) 51 Md. 138; *Gerard* v. *McCormick* (1891) 130 N. Y. 261, and where a banker reaps any personal benefit from a check deposited with him signed or endorsed by a trustee he is put on inquiry as to the depositor's authority to draw against it, for he then knows that it is not being applied to the purpose of the trust. *Foxton* v. *Manchester & Liverpool District Banking Co.* (1881) 44 L. T. (N. S.) 406, 408; *Coleman* v. *Bucks and Oxon Union Bank* (1897) L. R. 2 Ch. Div. 243. But where a banker derives no personal benefit from a deposit, it sems equally well established that he is not put on inquiry by the nature of the check. *Bachelder* v. *Central Natl. Bank* (1905) 188 Mass. 25; *Safe Deposit & Trust Co., Adm'r* v. *Diamond Natl. Bank* (1900) 194 Pa. St. 334. And it seems, as was maintained in the dissent, that Van Voorhis in drawing money from the defendant. might still appear to be acting in his fiduciary capacity, in which case the defendant would not be justified in refusing payment. *Gray* v. *Johnston* (1868) L. R. 3 E. & I. App. 1.

CONFLICT OF LAWS—CHANGE OF DOMICILE—EFFECT ON AFTER ACQUIRED MARITAL PROPERTY.—The respondent and the decedent, both citizens of France, were married in that country without express antenuptial contract. Under such circumstances the French Code provides that the parties shall have a community of interest both in property then owned and any subsequently acquired. The parties migrated to New York, where they became domiciled. The husband acquired both real and personal property, which upon his death was subjected to the transfer tax, from which tax the widow sought to be relieved as to one-half of the property, by virtue of the French law of community. *Held,* two judges dissenting, the transfer tax applied. *In the Matter of Majot* (1909) 119 N. Y. Supp. 888. See Notes, p. 147.

CONTRACTS—DEFENSES—WAIVER OF RIGHT TO COUNTERCLAIM DAMAGES.—In a suit by the vendor on a renewal note for the purchase price of machinery, the vendee sought to set off damages sustained through the plaintiff's failure to ship the machinery at the stipulated time. *Held,* this defense was waived by the execution of the renewal note. *Hyer* v. *York Mfg. Co.* (Fla. 1909) 50 So. 485.

The principal case apparently fails to distinguish between breach of a condition, which may be waived by the party in whose favor the condition was made, and breach of a promise causing damage to the vendee. *Brady* v. *Cassidy* (1895) 145 N. Y. 171; cf. *Reid* v. *Field* (1887) 83 Va. 26. On principle, it is difficult to see how a vested cause of action arising from breach of contract can be waived by conduct not giving rise to an estoppel. *Jorden* v. *Money* (1854) 5 H. L. Cas. 185, 214. Of course, the defense of a breach of contract by the vendor may be barred by the vendee's subsequent express or implied promise, on a new consideration, not to counterclaim damages. *McCormick Machine Co.* v. *Yoeman* (1900) 26 Ind. App. 415. Where, however, as in the principal case, no such intention appears, the bare renewal should not have the effect of waiver. While a renewal of notes has been held to waive the defense of failure of consideration, as raising the presumption that the buyer got what he contracted for, *Lunsford Maxwell & Co.* v. *Malsby* (1897) 101 Ga. 39, the vendee's right to recover for breach of a warranty is not barred by renewal of

notes, *Northwestern Cordage Co.* v. *Rice* (1896) 5. N. D. 432, nor by payment of the agreed price; *Gilmore* v. *Williams* (1894) 162 Mass. 351; and the vendee's failure to give notice of the breach before action is merely evidence that the warranty was not in fact broken. *English* v. *Spokane Comm. Co.* (1893) 57 Fed. 451. It would seem that these latter cases, which represent the correct theory, should control the principal case, where the breach was of a promise as to time of delivery. *Strain & Swinburn* v. *Mfg Co.* (1891) 80 Tex. 622. There are, however, numerous *dicta* and a few decisions which support the doctrine of waiver of the principal case. *Roby* v. *Reynolds* (1892) 65 Hun. 486.

CONTRACTS—DURESS BY THREATS OF IMPRISONMENT.—The defendant, by threatening to imprison the plaintiff's son, induced the plaintiff to enter into a contract for the conveyance of land. In an action to avoid the contract the defendant pleaded that the threatened imprisonment was lawful. *Held,* the defense was inadequate. *Ball* v. *Ward* (N. J. 1909) 74 Atl. 158.

Since the free exercise of volition is essential to the creation of a valid contract, an agreement induced by threats of imprisonment is avoidable at common law, *Osborn v. Robbins* (1867) 36 N. Y. 365, but, according to the early decisions, only if the threatened imprisonment is unlawful, Clark, Contracts 358, and if the duress is offered to the party who seeks to take advantage of it, *Mantel* v. *Gibbs* (1254) 1 Brownl. 64; *Wayne* v. *Sands* (1673) 1 Freeman 350; *Robinson* v. *Gould* (Mass. 1853) 11 Cush. 55, except in cases of very near relationship, as husband and wife or parent and child. *Harris* v. *Carmody* (1881) 131 Mass. 51; *Wayne* v. *Sands supra.* The more recent decisions, adopting the equitable doctrine, take a much broader view and declare that the question is whether the liability to imprisonment has been unlawfully used to induce the contract, for even though as between the public and the defendant the imprisonment is lawful, yet by the unlawful use of this liability for the purpose of compelling the execution of a contract the party is thereby deprived of the free exercise of his volition. *Morse* v. *Woodworth* (1891) 155 Mass. 233; *Taylor* v. *Jaques* (1871) 106 Mass. 291; *Hackett* v. *King* (Mass. 1863) 6 Allen 58. Consequently, in cases involving the relation of husband and wife or parent and child, each may avoid a contract induced by threats of imprisonment of the other regardless of whether the imprisonment is or is not unlawful. The decision of the principal case is in accord with the later development of the law.

CORPORATIONS—JURISDICTION OF FOREIGN CORPORATIONS—MANDAMUS.—Mandamus was asked to compel the secretary of a foreign corporation to call a meeting of its stockholders for the purpose of effecting a change in the articles of incorporation of two allied corporations. *Held,* the court would not assume jurisdiction to grant me the writ. *State* v. *DeGroat* (Minn. 1909) 123 N. W. 417.

The rule in equity and as to the writ of mandamus seems to be that the courts of a state will not exercise jurisdiction in matters relating purely to the internal affairs of a foreign corporation. *Wilkins* v. *Thorne* (1883) 60 Md. 253; *Vorhees* v. *Mason* (Ill. 1909) 39 Nat. Corp. Rep. No. 20. This seems to be founded on the fear of a conflict of jurisdiction, *Morris* v. *Stevens* (1868) 6 Phila. 488, the difficulty of enforcing a decree, *Watkins* v. *Timber Co.* (1902) 106 La. 621, and a disinclination to apply the local statutes of other states. *Smith* v. *Mutual Life*

Ins. Co. (Mass. 1867) 14 Allen 336. As originally laid down it excluded rights which, though individual, were based on membership in the corporation; *North Star etc. Co.* v. *Field* (1885) 64 Md. 151; but it has been widened so that a party may assert an individual right, though it arises from his connection with the company. *Guilford* v. *Western Union Tel. Co.* (1894) 59 Minn. 332. While the general rule is applied in clear cases, *Madden* v. *Electric Light Co.* (1897) 181 Pa. St. 617, in others the decisions are often influenced by the local statutes of jurisdiction, *Stafford & Co.* v. *Amer. Mills Co.* (1881) 13 R. I. 310; *Jacobs* v. *Mexican etc. Co.* (N. Y. 1905) 104 App. Div. 342, the prevailing view of the nature of mandamus, *Jenkins* v. *Parker Vein Coal Co.* (N. Y. 1854) 1 Abb. Pr. 128, or the fact that the plaintiffs and defendants are residents and the property and business is largely within the state. *Wason* v. *Buzzell* (1902) 181 Mass. 338; *Richardson* v. *Clinton etc. Co.* (1902) 181 Mass. 580. The consideration of residence applies with special force where stockholders seek by mandamus to compel an officer to exhibit the books of a corporation. *Richardson* v. *Smith* (Del. 1885) 7 Houst. 338. Since in the principal case the plaintiffs and defendant were both non-residents, the business was carried on for the most part without the state, and the act would apparently affect the internal management, the court was clearly correct in refusing to grant the writ.

CORPORATIONS—PURCHASE OF OWN SHARES—SUBSEQUENT CREDITORS.—The use of corporate assets in purchasing its own shares rendered a corporation insolvent. *Held,* the shareholder, knowing this result and contemplating the continuance of the corporate business, was presumed to have a fraudulent intent as to future creditors, sufficient to vitiate the transfer. *Atlanta Ass'n.* v. *Smith* (Wis. 1909) 123 N. W. 106.

A conveyance by a corporation may be declared void at the instance of creditors whose claims arise subsequent to the transaction, where a similar transfer by an individual could be questioned, *Sommermeyer* v. *Schwartz* (1894) 89 Wis. 66, that is, in the case of actual fraud; *Graham* v. *R. R. Co.* (1880) 102 U. S. 148; or again where the transaction is between the corporation and its stockholders, the rights of subsequent creditors may rest on estoppel. Where the assets of a corporation have been depleted below the amount of its capital stock by issuing to shareholders stock, paid for in part only, as fully paid for, *Alabama Co.* v. *Hall* (1907) 152 Ala. 262, or where stock is exchanged for property grossly overvalued, *Lea* v. *Iron Belt Co.* (1906) 147 Ala. 421, or where stock has been issued as a bonus, see *First Nat'l. Bank v. Mining Co.* (1890) 42 Minn. 327, the shareholders involved are parties to the misrepresentation that the capital stock is paid up, *Elyton Co.* v. *Warehouse Co.* (1890) 92 Ala. 407, and are estopped to allege the validity of the transaction as to subsequent creditors extending credit in reliance on the representation. *Hospes* v. *N. W. Mfg. Co.* (1892) 48 Minn. 174. The facts in the principal case give rise to such a misrepresentation, and it is submitted that the result might well be placed on the ground that the vendor of the shares is thus estopped to set up the severance of his connection with the corporation. To hold, as does the principal case, that the facts involved, of themselves, warrant the presumption of fraud sufficient to vitiate the transfer is an extension of the general rule unsupported by authority and apparently unnecessary to attain the desired result. This being the *ratio decedendi* the court's additional reference to

estoppel is open to criticism in that it involves a supposition, namely, the validity of the transfer, inconsistent with the fraud theory.

COURTS—CONTEMPT—VIOLATION OF INJUNCTION BY STRANGER.—The defendants having violated the terms of an injunction, an action was brought to punish them for contempt of court. *Held,* since they were not parties to the original suit the action would not lie. *In re Zimmerman* (1909) 119 N. Y. Supp. 275.

Text writers generally lay down the broad rule that a person who was not a party to the suit in which an injunction has issued cannot be held in contempt for a violation of its terms. 2 Spelling, Injunctions § 1126; 2 High, Injunctions § 1435; Rapalje, Contempt § 47. The only exception to this rule, it seems, is recognized in the case of agents and servants who may be held liable for violating an injunction issued against their employer. *Daly* v. *Amberg* (1891) 126 N. Y. 490. The Federal Courts, however, take a different view and hold that any person who with knowledge that an injunction has issued either independently attempts to prevent the execution of the order, *In re Reese* (1901) 107 Fed. 942, or conspires to defeat its purpose, *W. B. Conkey Co.* v. *Russell* (1901) 111 Fed. 417; *In re Lennon* (1896) 166 U. S. 548, is guilty of contempt. A New York case has substantially adopted this doctrine, though the effect of the decision may be somewhat restricted by a finding that the defendants acted under the direction of parties to the action. *People* v. *Marr* (N. Y. 1903) 88 App. Div. 422. In such cases it is said that the defendant is not guilty of a technical breach of the injunction but of an independent act of disrespect for the dignity and authority of the court, for which, in the interests of the proper administration of justice, he is held liable. *Chisolm* v. *Caines* (1903) 121 Fed. 397. The courts suggest a distinction between civil and criminal contempt, but this distinction amounts to no more than saying that, although not bound by the terms of the restraining order, a person may, nevertheless, be guilty of criminal contempt if, with knowledge of the existence of the injunction, he deliberately attempts to set at naught the process of the court. Since, in the principal case, it is not shown that the defendants knew of the existence of the injunction, they could not, even under the doctrine of these later cases, be held for contempt.

COURTS—FEDERAL EQUITY JURISDICTION IN MATTERS OF ADMINISTRATION.—The plaintiff, as residuary legatee under a will admitted to probate in a state court, sued the executor in a federal court to have her interest in a lapsed legacy established, and for an accounting of the estate. The requisite diversity of citizenship existed. *Held,* one judge dissenting, the court had jurisdiction to establish the plaintiff's claim against the executor, though not to decree an accounting. *Waterman* v. *Canal-Louisiana Bank and T. Co.* (1909) 30 Sup. Ct. Rep. 10.

The former jurisdiction of Chancery to compel an executor to account and administer assets at the suit of creditors or legatees is undoubted. 1 Story, Eq. Jur. §§ 530-543. Although it is broadly stated that a federal court of equity has the jurisdiction formerly possessed by Chancery, *Payne* v. *Hook* (1868) 7 Wall. 425, 430, this jurisdiction is in practice limited by the rule of comity that a federal court will not interfere with property in the lawful custody of a state court, neither by issuing execution on the decedent's property, *Yonley* v. *Lavender* (1874) 21 Wall. 276, nor by a decree looking to the mere admin-

istration of the estate. *Byers* v. *McAuley* (1892) 149 U. S. 608. It may, however, establish a suitor's claim to a share of the estate by a decree binding the representative to regard it in distributing the assets. *Suydam* v. *Broadnax* (1840) 14 Pet. 67; *Payne* v. *Hook supra.* Its jurisdiction to decree an accounting seems more in doubt. In most states accounting has been made by statute a part of the administrative duties of the executor. 2 Woerner, Amer. Law of Admin. § 501. Since an account taken in equity entitles the plaintiff to a decree for payment of the balance found due, 1 Story, Eq. Jur. (13 Ed.) 443, 450, such a decree from a federal court would seem, as the principal case holds, to interfere with the administration in progress in the state court. See, *Moore* v. *Fidelity Trust Co.* (1905) 138 Fed. 1. *Payne* v. *Hook supra,* where an accounting was decreed, may perhaps be distinguished on the ground that the bill there alleged fraud by the administrator. But see, *Comstock* v. *Herron* (1893) 6 U. S. App. 626, 639.

COURTS—PROCESS—IMMUNITY FROM SERVICE.—The defendant, a citizen of Illinois, came into Kentucky for the sole purpose of appearing before a court in which he was charged with a crime. While there he was served with process in a civil action. *Held,* the service was illegal. *Kaufman* v. *Gardner* (C. C. W. D. Ky. 1909) 173 Fed. 550.

The courts are generally agreed that a non-resident defendant in a civil action is exempt from service of civil process, and the reason for this privilege is that, since he is compelled to defend his action in a foreign jurisdiction, he should be allowed to do so without the inconvenience of being harassed by other actions. *Matthews* v. *Tufts* (1882) 87 N. Y. 568; *Wilson Sewing Machine Co.* v. *Wilson* (1884) 51 Conn. 595. Some courts, it is true, hold that this immunity extends only to witnesses, *Baldwin* v. *Emerson* (1888) 16 R. I. 304, while others hold that a plaintiff who voluntarily brings action in a foreign jurisdiction is not entitled to this protection. *Bishop* v. *Vose* (1858) 27 Conn. 1. By the better authority, however, no distinction between the parties is observed. *Kinne* v. *Lant* (1895) 68 Fed. 436. In cases where the party has been brought within the jurisdiction for purposes of criminal prosecution, it has been held that the reasons for the application of the doctrine of privilege are wanting. *Scott* v. *Curtis* (1855) 27 Vt. 762. If the second action is of a criminal nature, it is quite possible to say that the protection of society from crime demands that the privilege be denied, *In re Little* (1902) 129 Mich. 454, but there seems to be no reason why a non-resident should not be granted the protection of exemption from civil process during the defense of a criminal as well as a civil prosecution. *U. S.* v. *Bridgman* (1879) Fed. Cas. 14645; *Murray* v. *Wilcox* (1904) 122 Ia. 188. The principal case seems to have been correctly decided.

CRIMINAL LAW—CHANGE OF VENUE—DISCRETION OF THE COURT.—Construing Sec. 9931 Rev. Codes 1905, which provides that upon application of State's attorney for removal of criminal action, the court may order such change, *Held,* two judges dissenting, the granting of such application is a matter within the discretion of the court, and its ruling will not be disturbed except for abuse of discretion. *State* v. *Winchester* (N. Dak. 1909) 122 N. W. 1111.

In England the writ of *certiorari* issued to effect a change of venue on the application of an individual at the discretion of the court,

Queen v. *Palmer* (1856) 5 El. & Bl. 1024, but on the application of the Crown as of right. *Queen* v. *Phelan* (1881) 14 Cox C. C. 579; 4 Bl. Comm. 321. In the United States change of venue is generally granted to the accused at the discretion of the court; *Andrews* v. *People* (1905) 33 Col. 193; but usually as of right in capital cases, *State* v. *Edwards* (1869) 25 Ark. 445; *Rafferty* v. *People* (1872) 66 Ill. 118, or where the application is based upon the bias of the trial judge. *State* v. *Henning* (1893) 3 S. D. 492; *Manly* v. *State* (1875) 52 Ind. 215. *Contra, State* v. *Heacock* (1898) 106 Iowa 191. Upon application of the state, however, it has been held that the common law right of trial by jury of the vicinage, guaranteed by the state constitution, forbids the granting of change of venue without the consent of the accused. *People* v. *Powell* (1891) 87 Cal. 348. But as this common law right was itself subject to the power of the Crown to obtain change of venue, the state also has this right; and this is necessary else, owing to local prejudice, the criminal might escape punishment and the state be unable to enforce its laws. *Barry* v. *Truax* (1904) 13 N. D. 131. In most American jurisdictions no distinction is made between application by the state or the individual, the change being granted at the discretion of the court upon proper statutory application and proof by either party. In accord with this rule, the majority opinion in the principal case is correct.

CRIMINAL LAW—HOMICIDE—FORFEITURE OF RIGHT OF SELF-DEFENSE.—The appellant was insulted, later returned, demanded an apology and shot deceased. Plea, self-defense. *Held,* that an instruction that jury should acquit if the appellant sought deceased "on a peaceable mission," put an improper restriction on appellant's rights. *McCleary* v. *State* (Tex. 1909) 122 S. W. 27.

The general rule is that one who provokes the necessity of taking life cannot justify the homicide on the ground of self-defense. 3 COLUMBIA LAW REVIEW 526, 531. Thus it is perfectly clear that if the necessity is intentionally brought on for the purpose of killing the deceased or doing him severe bodily injury, the right of self-defense is forfeited, *State v. Scott* (1889) 41 Minn. 365; *Roberts* v. *State* (1880) 65 Ga. 430, whether the act or means employed to provoke, and actually resulting in the occasion, were reasonably calculated to do so or not. *Mathews* v. *State* (1900) 42 Tex. Cr. 31. It is also well settled that if the acts of the defendant, irrespective of his intent, were such as to cause deceased reasonably to believe that his life was in danger or that he was in danger of severe bodily harm, then defendant is guilty of provoking the necessity, and the plea of self-defense can afford him no protection. *People* v. *Conkling* (1896) 111 Cal. 616. In the foregoing instances the right of self-defense is absolutely lost. But it is held that where the defendant, without any felonious intent, causes the dispute by words, an ordinary assault, or some act amounting to nothing more than a misdemeanor and not justifying a deadly attack by deceased in return, there is not such provocation as entirely to deprive him of the right of self-defense, though sufficient to abridge the right, making the homicide manslaughter. *Foutch v. State* (1896) 85 Tenn. 711; *People* v. *Filippelli* (1903) 173 N. Y. 509; *Reed* v. *State* (1882) 11 Tex. App. 509. Most courts test the gravity of the provocation by scrutinizing the act itself, *Foutch* v. *State supra,* but in Texas more emphasis seems to be laid on the intent accompanying the act. *Thornton* v. *State* (Tex. 1901) 65 S. W. 1105. In the principal case

the charge "on a peaceable mission," failing to include the possibility of an abridged right of self-defense, discussed above, is erroneous.

CRIMINAL LAW—LIBEL—LOCALITY OF OFFENSE IN NEWSPAPER PUBLICATION.—The editors of a newspaper in Indiana were indicted in Washington, D. C., on the charge of publishing there an alleged criminal libel contained in fifty copies of the said newspaper sent through the mails from Indiana to subscribers in Washington. An order for the removal of the defendants to Washington for trial was sought. *Held,* there was only one publication, and, since that was in Indiana, there was, therefore, no crime in Washington and the order must be refused. *U. S.* v. *Smith* (D. C., D. Ind. 1909) 173 Fed. 227. See Notes, p. 150.

DAMAGES — DELAYED DELIVERY OF TELEGRAPH MESSAGE — MENTAL ANGUISH.—A message summoning a daughter to her father's death-bed was so delayed that, owing to a peculiar train schedule, her start was postponed with the result that she failed to reach the death-bed in time. *Held,* no recovery could be had for mental anguish suffered during the journey as it was prolonged merely, and not caused by the delay. *Goodhue* v. *W. U. Tel. Co.* (Tex. 1909) 122 S. W. 41.

A few American jurisdictions consider negligent failure to deliver telegraph messages promptly actionable *per se,* and allow damages for whatever mental anguish is the proximate or presumably contemplated consequence of such negligence. *Stuart* v. *W. U. Tel. Co.* (1886) 66 Tex. 580; *Wadsworth* v. *W. U. Tel. Co.* (1888) 86 Tenn. 695. If the mental distress differs in kind from that ordinarly caused by the sickness or death of another, *e. g.,* that occasioned the addressee through failure to reach the bedside or funeral, *Chapman* v. *W. U. Tel. Co.* (1890) 90 Ky. 265, or that suffered by the sender because deprived of the presence and comfort of the addressee, *W. U. Tel Co.* v. *Nations* (1891) 82 Tex. 539, recovery is generally allowed. Whether the mere prolongation of such ordinary anguish is too remote a consequence, however, is unsettled, as the decisions are in conflict. *W. U. Tel Co.* v. *Hollingsworth* (1907) 83 Ark. 39; *Rowell* v. *W. U. Tel. Co.* (1889) 75 Tex. 26; *Womack* v. *W. U. Tel Co.* (1895) 9 Tex. Civ. App. 607. On principle, recovery should be allowed to the sender of a message requesting quieting news, if the answer is delayed, *W. U. Tel Co.* v. *Hollingsworth supra,* or to the sender of a message summoning medical aid, compelled by such delay to witness for an extra period the suffering of a child. *W. U. Tel. Co.* v. *Cavin* (1902) 30 Tex. Civ. App. 152. But where, as in the principal case, this prolongation is in part attributable to peculiar train schedules of which the company had no notice, recovery is rightly denied. *W. U. Tel. Co.* v. *Edmondson* (1897) 91 Tex. 206. The decision therefore is correct.

DAMAGES—WRONGFUL DEATH OF INFANT—FIXED BY CONJECTURE.—Defendant was sued for negligence alleged to have caused the death of a female child, three months old, seriously ill at the time. *Held,* Ellsworth J. dissenting, the pecuniary value of the child's services to the parent during minority was too speculative to be determined by a jury. *Sherer* v. *Schlaberg* (N. D. 1909) 122 N. W. 1000.

In addition to the statutes in some of the states providing for the survival of certain personal actions after the death of the injured party, there is found generally in the United States a statutory action under which damages for the prospective pecuniary loss caused

by the wrongful death of an infant are recoverable. *Sutherland, Damages* (3rd ed.) 3695. By the weight of authority proof of special pecuniary loss is not required. *Nagel* v. *Mo. Pac. Ry. Co.* (1882) 75 Mo. 653; *Atrops* v. *Costello* (1894) 8 Wash. 149. *Contra, Hurst* v. *Detroit City Ry.* (1891) 84 Mich. 539. In a number of jurisdictions the law presumes a pecuniary loss where the infant leaves a father entitled to his services. *Chicago* v. *Hesing* (1876) 83 Ill. 204. See also *Ihl* v. *Forty Second Street, etc. R. Co.* (1872) 47 N. Y. 317. Substantial damages are allowed in the United States even where the child was of very tender age. *Hoppe* v. *Chicago, etc. Ry. Co.* (1884) 61 Wis. 357; *Sweet* v. *Providence, etc. R. Co.* (1890) 20 R. I. 785. But in Georgia the child must have been capable of rendering service at the time of injury, under that jurisdiction's so called common law action for damages for loss of prospective services, *Allen* v. *Atlanta St. R. Co.* (1875) 54 Ga. 503, or under its statute. *Civil Code* Sec. 3828. Notwithstanding it is often necessarily speculative, the question of the amount of loss must be submitted to the determination of the jury. *Birkett* v. *Knickerbocker Ice Co.* (1888) 110 N. Y. 504; *Schnable* v. *Prov. Public Market* (1902) 24 R. I. 477. The ruling in the principal case, accordingly, is not supported by the prevailing authority.

EMINENT DOMAIN—COMPENSATION FOR DAMAGE TO LAND NOT TAKEN.—Instructions to the jury in condemnation proceedings included in the elements of damage to land not taken "the liability of stock to be killed and the danger of fire from passing trains," without limitation to damage caused by the use of the road without negligence. *Held,* the instructions were correct. *Beckman* v. *Lincoln & N. W. R. R. Co.* (Neb. 1909) 122 N. W. 994.

When part of a lot is taken by eminent domain, the depreciation in the market value of the remainder caused thereby must also be compensated for. *Adden* v. *Railroad Co.* (1875) 155 N. H. 413. Most courts consider as an element tending to such depreciation, the danger of stock being killed, *Pecksport Connecting Ry. Co.* v. *West* (1897) 45 N. Y. S. 644, although this view has been dissented from. *Indianapolis & C. Transfer Co.* v. *Larrabbee* (1906) 168 Ind. 237. The danger of fire to buildings is also usually considered. *Kay* v. *Glade Creek & R. R. Co.* (1900) 47 W. Va. 467. But see *In the Matter of the Union Village* v. *J. R. R. Co.* (N. Y. 1868) 53 Barb. 457. Since the railroad is liable for fires due to negligence and since negligence should not reasonably be anticipated, some courts consider danger only from accidental fires as an element of depreciation. *Kay* v. *Glade Creek & R. R. Co. supra.* Other courts, considering that the liability of the railroad to respond in damages for negligence is not a sufficiently certain or adequate compensation and that the marketability depends on the judgment of the prospective purchaser, who in fact anticipates negligence, refuse to make this distinction. *Bangor & P. R. R. Co.* v. *McComb* (1872) 60 Me. 290; *Adden* v. *Railroad Co. supra.* As an indication of such depreciation some courts allow the introduction of evidence of a change in the insurance rate *C. R., I. F. & N. W. Ry. Co.* v. *Raymond* (1887) 37 Minn. 204. *Contra Pingrey* v. *The Cherokee & D. Ry. Co.* (1889) 78 Ia. 438. The principal case, in considering the danger from all fires, is supported by the weight of authority and the better reasoning.

EMINENT DOMAIN—COMPENSATION—HOUSE PLANTING.—The appellant, while condemnation proceedings against his land were in progress, moved a building on it, to enhance his damages. *Held,* because of the appellant's bad faith, the building remained personal property and could not be regarded as realty for the purpose of awarding damages. *In re Briggs Ave. in City of New York* (N. Y. 1909) 89 N. E. 814.

If an article is annexed to the freehold with the intention of making it a permanent accession it is a fixture as between vendor and vendee. *McRae* v. *Central Nat. Bank of Troy* (1876) 66 N. Y. 489, 495. In the absence of proof to the contrary such intent is presumed from actual annexation. *Potter* v. *Cromwell* (1869) 40 N. Y. 287, 296. If machines are affixed merely for the purpose of steadying them, an intent to make them a permanent part of the realty is negatived. *Murdock* v. *Gifford* (1858) 18 N. Y. 28. The decision in the principal case regards an annexation for the purpose of enhancing damages in the same light. It is open to argument that such a purpose is not necessarily inconsistent with an intention to make a permanent accession, and the decision of the principal case seems of doubtful validity on this point. A better ground for justifying the result is the general principle that a man cannot enhance his damages. *Walrath* v. *Redfield* (N. Y. 1851) 11 Barb. 368. While improvements erected before the final award is made must be compensated for, *Forster* v. *Scott* (1893) 136 N. Y. 577, the rule should not be applied to a case in which the improvement is made in bad faith. *State v. Carragan* (1872) 36 N. J. L. 52, 54; *Sherwood* v. *St. Paul & Chicago R. R. Co.* (1874) 21 Minn. 122, 126.

FEDERAL PRACTICE—CRIMINAL PROCEDURE—SPECIAL PLEA IN BAR.—An indictment under § 5440 U. S. R. S. charged a conspiracy and a series of overt acts in pursuance thereof. The defendant, in the same plea, pleaded the statute of limitations to some of the acts and non-participation in others. The prosecution demurred. *Semble,* the plea was proper in form. *U. S.* v. *Kissell et al.* (C. C., S. D. N. Y. 1909) 173 Fed. 823. See Notes, p. 159.

INSURANCE—"MORTGAGE CLAUSE"—APPRAISAL OF LOSS.—A mortgagor insured his premises, the policy containing an appraisal clause and also a mortgagor clause "loss payable to the mortgagee as his interests may appear, the insurance to this extent only, not to be invalidated by any breach of the conditions in the policy on the part of the mortgagor." A loss occurred and an appraisal and award was had without the knowledge of the mortgagee. *Held,* the mortgagee was bound by the appraisal and award although he was not a party thereto. *Erie Brewing Co.* v. *Ohio Farmers' Ins. Co.* (Oh. 1909) 89 N. E. 1065. See Notes, p. 153.

JUDGMENTS—FOREIGN DECREE IN CHANCERY—FULL FAITH AND CREDIT.—In an action to quiet title, plaintiff relied upon a commissioner's deed made under a divorce decree of a court of another state, which, in determining the equities of the parties, had ordered the husband to convey the land to the wife. *Held,* two judges dissenting, the foreign decree gave no such equities as must be recognized under the full faith and credit clause in this form of action. *Fall* v. *Eastin* (1909) 30 Sup. Ct. 3.

The decision rests upon the fundamental principle that no judgment or decree can have *per se* any extraterritorial effect upon the title to land. See *Newton* v. *Bronson* (N. Y. 1856) 67 Amer. Dec. 89 and note. The Constitution, however, renders judicial proceedings in sister states conclusive evidence of the matters decided. There is no distinction in this respect between judgments at law and decrees in equity. *Hunt* v. *Lyle* (Tenn. 1835) 8 Yerg. 142. Thus an action of debt will lie on the foreign decree for the payment of money. *Nations* v. *Johnson* (1860) 24 How. 195; *McKin* v. *Odom* (1835) 12 Me. 94; and see *Bennett* v. *Bennett* (1901) 63 N. J. E. 306. It is said, however, that a bill in equity cannot be maintained upon a decree for the performance of other acts, such as the conveyance of land. See, *Bullock* v. *Bullock* (1894) 52 N. J. E. 561. But it would seem that this is true only when such decree is in the nature of an execution and is not an actual adjudication of rights, see *Bullock* v. *Bullock* (1893) 51 N. J. E. 444; *Eliz. Sav. Inst.* v. *Gerber* (1881) 34 N. J. E. 130, because it is settled that, when a court has in fact decided the equities of the parties, its decree may be pleaded in a sister state as conclusive evidence of such equities, as a defense, *Burnley* v. *Stevenson* (1873) 24 Oh. St. 474; *Dobson* v. *Pearce* (1854) 12 N. Y. 156, or as the basis of an original bill. *Dunlap* v. *Byers* (1896) 110 Mich. 109; *Fletcher* v. *Farrell* (Ky. 1840) 9 Dana. 372; *Page* v. *McKee* (Ky. 1867) 3 Bush. 135. Hence a different result would be necessary had the plaintiff in the principal case relied upon the foreign decree only as evidence of an equitable duty to convey.

JUDGMENTS—*Res Adjudicata*—PRINCIPAL AND AGENT AS "PARTIES."—The consignee of a package had sued the plaintiff and recovered a judgment for $2000, the ostensible value of the package. The plaintiff then sued the consignor on the ground of fraud in the shipment. *Held,* the prior judgment for the consignee was not conclusive as to the actual value of the package in favor of the consignor. *American Express Co.* v. *Des Moines National Bank* (Ia. 1909) 123 N. W. 342. See Notes, p. 156.

JURORS—COMPETENCY—RELIGIOUS AFFILIATION.—In an action against a Roman Catholic bishop as trustee for a local church, the lower court excluded from the jury all Roman Catholics of the diocese. *Held,* in the absence of proof of direct pecuniary interest, the excluded jurors were competent. *Searle* v. *R. C. Bishop of Springfield* (Mass. 1909) 89 N. E. 809.

A person is not disqualified from sitting as a juror merely because he holds the same religious faith as one of the parties, *Smith* v. *Sisters etc., of Louisville* (Ky. 1905) 87 S. W. 1083, or is affiliated with him in the same fraternal organization. *Purple* v. *Horton* (N. Y. 1834) 13 Wend. 9. A pecuniary interest in the cause, however, is sufficient at common law to bar a person from acting as judge or juror, and such interest is presumed from membership of a body politic which is a party to the action. Co. Litt. 157, a, b; *Hesketh* v. *Braddock* (1766) 3 Burr. 1847. The rule disqualifying judges no longer presumes an interest in actions against a municipality in which the judge is a taxpayer. *Higgins* v. *City of San Diego* (Cal. 1899) 58 Pac. 700; *City of Dallas v. Peacock* (1895) 89 Tex. 58. The old common law rules as to the competency of jurors, however, have been strictly observed in most jurisdictions, *Hearn* v. *City of Greensburgh* (1875)

51 Ind. 119, though here too in some states the courts ignore as too remote the interest of a taxpayer in an action against a public corporation. *City of Detroit* v. *Detroit R.* (1903) 134 Mich. 11; *Kemper* v. *City of Louisville* (Ky. 1878) 14 Bush 87. In many states the disqualification is expressly removed by statute. *Hildreth* v. *City of Troy* (1886) 101 N. Y. 234. The holding of the principal case is, however, consistent even with the more conservative doctrine. While a member of the particular parish interested may be excluded, *Cleage* v. *Hyden* (Tenn. 1871) 6 Heisk. 73, it cannot be contended that the moral obligation to contribute to the general funds of the diocese creates a disqualifying pecuniary interest.

MASTER AND SERVANT—MEDICAL TREATMENT—LIABILITY FOR MALPRACTICE.—The plaintiff, an employee of the defendant, lost the sight of an eye under the treatment of the physician, who was under contract with the defendant to treat employees, and to whose compensation a part of the employees' wages was applied. *Held,* if it were found that the defendant's hospital department was conducted for profit, the defendant was liable for the malpractice of the physician in charge. *Zumwalt* v. *ex. Central R. R.* (Tex. 1909) 121 S. W. 1133.

It is well established, though not universally accepted, that where one renders medical services as a charity he is not liable for the torts of his servants, *Hearns* v. *Waterbury Hospital* (1895) 66 Conn. 98; *U. P. R. R. Co.* v. *Artist* (1894) 60 Fed. 365, though he is liable for negligence in the selection of incompetent servants. *Cummings* v. *Chi. & N. W. Ry.* (1899) 89 Ill. 199; *McDonald* v. *Mass. Hospital* (1876) 120 Mass. 432. If, however, a hospital department of a corporation is maintained for profit, many cases hold that the corporation is liable for the malpractice of a physician employed. *Richardson* v. *Carbon Hill Coal Co.* (1893) 6 Wash. 52; *Tex. & Pac. Coal Co.* v. *Connaughtem* (1899) 20 Tex. Civ. App. 642. But the employer of an independent contractor is not liable for the contractor's torts, *Murray* v. *Currie* (1870) L. R. 6 C. P. 24; *Thomas* v. *Altoona Ry.* (1899) 191 Pa. St. 361, and so it would seem on principle that one who engages a physician should not be liable for the latter's malpractice, as he is distinctly an independent contractor. *Pearl* v. *West End Street Ry.* (1900) 176 Mass. 177; *Myers* v. *Holborn* (1895) 58 N. J. L. 193. The result in the principal case, however, is sound on the theory that the plaintiff contracted for good treatment and did not receive it, *Ward* v. *St. Vincent's Hospital* (N. Y. 1899) 39 App. Div. 624, or on the ground that the employer has held himself out as furnishing first class treatment and will be estopped to deny his liability. *Hannon* v. *Siegel Cooper Co.* (1901) 167 N. Y. 244; *Sawdey* v. *Spokane Falls Ry.* (1902) 30 Wash. 349.

NEGOTIABLE INSTRUMENTS—*Bona Fide* PURCHASER—FUNDS OF FRAUDULENT DRAWER IN HOLDER'S HANDS.—The plaintiff bank purchased without notice drafts accepted by the defendant for a fraudulent consideration. After notice of the fraud, the plaintiff had funds of the drawer on deposit sufficient to pay the drafts. *Held,* the plaintiff could recover only on drafts which had not matured while it held the drawer's funds. *Johnson County Savings Bank* v. *Renfro* (Tex. 1909) 122 S. W. 37.

The principal case bases the bank's duty to apply the fraudulent drawer's funds to the drafts as they matured on an alleged equitable

principle. Since, however, the rights of the *bona fide* holder of negotiable paper are strictly legal, and wholly distinct from those of an innocent purchaser for value in equity, Langdell, Equity Pleading (2nd ed.) 209, 210, it is difficult to see how equitable considerations of hardship to the acceptor, resulting from the drawer's fraud, can affect the holder's cause of action. And as the obligation of an acceptor or endorser, once perfected by negotiation of the instrument to an innocent purchaser for value, remains absolute even toward subsequent holders with actual or constructive notice, *Chalmers* v. *Lanion* (1808) 1 Camp. 383; *Shaw* v. *Clark* (1882) 49 Mich. 384, the holder should not lose his corresponding right against the acceptor simply because he has funds of the drawer which he can apply to the debt; for the acceptor of a bill is the principal debtor thereon. 1 Daniel, Negotiable Instruments (4th ed.) 526. The acceptor besides had an adequate remedy against the drawer; for, as negotiation of the vendee's note by the vendor operates as payment between the parties, *Bunney* v. *Poyntz* (1832) 4 B. & Ad. 568, the vendee on discovering the fraud, and before maturity, can avoid the sale and recover the purchase price from the vendor. *James* v. *Hodsden* (1874) 47 Vt. 127. In the principal case, therefore, the bank should have recovered on all the drafts in suit.

PAROL TRUSTS—EXECUTION—WHAT CONSTITUTES.—A, before his death, made a deed to his mother, on a parol trust for his children. The deed was never recorded and later disappeared. *Semble,* a destruction of the deed with the intent to execute the trust, might have that effect when accompanied by the vesting of title in the children as heirs of A. Accordingly, the statute of frauds would not operate. *Lake et al.* v. *Weaver et al.* (N. J. 1909) 74 Atl. 451. See Notes, p. 151.

PARTNERSHIP—ESSENTIALS—AGENCY TEST.—Two parties were engaged in the business of selling encyclopedias. There was no written agreement and no evidence of any important transaction carried on by one alone. *Held,* no partnership existed, since it was not shown that either one had power to bind the firm. *Jackson* v. *Hooper* (N. J. 1909) 74 Atl. 130.

A partnership is a common business with a view to profit, created by contract between the parties either express, *Hazard* v. *Hazard* (1840) 1 Story 371, or implied. *McCabe* v. *Sinclair* (1904) 66 N. J. E. 24. In declaring what are the essentials of a partnership agreement, most courts put some emphasis on the notion of control of the business by the partners. So a community of interest is held an essential. *Holme* v. *Hammond* (1872) L. R. 7 Exch. 218. This means that there must be some common business, *Coope* v. *Eyre* (1788) 1 H. Bl. 37, and that each party must have some control in it, *Holme* v. *Hammond supra,* and it excludes mere joint ownership in the property. *Quackenbush* v. *Sawyer* (1880) 54 Cal. 439. Another important factor is a sharing in the profits and losses. This, however, in itself is not sufficient, *Meehan* v. *Valentine* (1891) 145 U. S. 611, since an executor who receives profits but exercises no control, *Wild* v. *Davenport* (1886) 48 N. J. L. 129, or an employee without authority to direct, who receives profits in lieu of salary, *Shaw* v. *Galt* (1864) 16 Ir. C. L. 357, is not a partner. In *Cox* v. *Hickman* (1860) 8 H. L. Cas. 268, it was held that there was no partnership unless one member could bind the firm as an agent binds his principal, but this has been severely criti-

cized in both England and America, and indeed seems to give an effect rather than a test. It is especially unsatisfactory, since the partner may contract to make one party sole agent for the whole firm. *Beecher* v. *Bush* (1881) 45 Mich. 188. While the idea of control is of considerable importance, there can be no one, all-inclusive rule as to what constitutes a partnership, and the best method is to see what is the intention of the parties as evidenced by the whole transaction. It would, therefore, appear that the court in the principal case laid too much stress on the single test of agency.

PLEDGE—CHOSES IN ACTION—DELIVERY.—Holders of deposit certificates of an insolvent bank, issued in an attempt to pledge to them certain bonds as security, sued to establish their lien against the assignee for creditors. The bonds were kept separate by the bank but were not delivered. *Held,* the pledge was void. *Burnes* v. *Daviess, etc. Assignee* (Ky. 1909) 122 S. W. 182.

In the attempt of the courts to apply to choses in action the common law rule requiring delivery for the perfection of a pledge as against third parties, a variety of holding has resulted, first, from the difference in the terms of the statutes which in some jurisdictions control. So, where as in the principal case the statute says delivery is necessary to create a charge on "personalty," choses in action of necessity fall within the rule, while if "goods and chattels" is used, a contrary result sometimes obtains. *Young* v. *Upson* (1902) 115 Fed. 192. In the absence of statute, the strict requirement of delivery is of necessity variously relaxed depending on the possibility of delivery from the presence or absence of tangible evidence of the chose. So it has been held that the mere assignment of book accounts is sufficient to pledge them. *Stackhouse* v. *Holden* (N. Y. 1901) 66 App. Div. 423. In the case of negotiable instruments, delivery of the instrument, the evidence of the chose, is generally required, *Mahoney* v. *Hale* (1896) 69 N. W. 334, though not always endorsement. *Smith* v. *Jennings* (1885) 74 Ga. 551. For the transfer of stock, in many states regulated by statute, *Jones, Pledges* § 180, a delivery of the certificate is sometimes held sufficient, *Blouin* v. *Liquidators* (1878) 30 La. Ann. 714, but many jurisdictions require in addition a transfer on the company's books. *Koons* v. *First Natl. Bank* (1883) 89 Ind. 302. In the case of bonds, delivery of the instrument is the general rule, *Seymour* v. *Hendee* (1893) 54 Fed. 563, but a delivery of an assignment under seal has been held good. *Mott* v. *Hospital* (1897) 55 N. J. E. 722. The principal case is in accordance with the authorities.

REAL PROPERTY—NATURE OF EASEMENTS IN GROSS.—The owner of a mill privilege on conveying land reserved to himself, his heirs and assigns, the right "to pump water to the dwelling house and premises of R." At the time of the conveyance the grantor did not own the designated premises. He later became the owner. *Semble,* this was an easement in gross, which attached to the premises when acquired and thereby became appurtenant. *Percival* v. *Williams* (Vt. 1909) 74 Atl. 322.

Contrary to the general rule, Massachusetts and several other jurisdictions recognize the assignability of easements in gross. *Goodrich* v. *Burbank* (Mass. 1866) 12 Allen 459; 7 COLUMBIA LAW REVIEW 536. Under this doctrine they may be assigned in perpetuity, *Pinkum* v. *City of Eau Claire* (1892) 81 Wis. 201, and to several parties. *French*

v. *Morris* (1869) 101 Mass. 68. It may be doubted, however, whether the latter could be done if it would surcharge the estate out of which it is granted. The owner of an easement in gross may attach it to a certain piece of land, and, if the intention be present, it will pass at a sale of the land, *Bank of British North America* v. *Miller* (1881) 7 Sawyer 163, but this does not preclude its subsequent severance. *Lonsdale Co.* v. *Morris* (R. I. 1857) 21 L. Rep. 658, 664. Further, a right granted in gross may be restricted in use to a certain piece of land. In this case, though the right itself is assignable, it can never be used apart from the land. *Amidon* v. *Harris* (1873) 113 Mass. 59. Such a right is closely akin to an easement appurtenant, but differs from it in that there is no dominant tenement and that the owner needs no freehold interest in the land to exercise it. An easement appurtenant capable of immediate enjoyment cannot be created unless the grantee has the dominant tenement; intention to acquire it is insufficient. Gale, Easements, Chap. 2, § 4; but see *N. B. Ry. Co.* v. *Park Yard Co.* L. R. (1898) App. Cas. 643. The above device, however, apparently renders this possible.

TAXATION—SPECIAL FRANCHISES—METHOD OF VALUATION.—The state tax commissioners assessed the value of the plaintiff's special franchise by the "net earnings" rule. From the gross earnings, operating expenses, including an allowance for depreciation, and a fair return on the capital invested in real and tangible personal property were deducted. The residue capitalized at a fair rate was considered the value of the special franchise. *Held,* the method adopted was proper. *People ex rel. Jamaica Water Supply Co.* v. *Tax Commissioners* (N. Y. 1909) 89 N. E. 581. See Notes, p. 158.

TORTS—CONVERSION—DUTY OF CARRIERS OF LIVE STOCK.—A carrier removed from a car two horses injured by fire in the course of transportation to have them treated. The removal was made over the objection of the shipper's attendant in charge. *Held,* no conversion. *Spokane Grain Co.* v. *Gt. Northern Express Co.* (Wash. 1909) 104 Pac. 794.

In the absence of contract the duty of a carrier of stock comprehends not only mere transportation but also care of the stock during the journey. *Clark* v. *Rochester & Syracuse Ry. Co.* (1856) 14 N. Y. 570. But when by contract it is stipulated that the shipper shall care for the stock, the carrier is, of course, relieved of this duty, *Central of Ga. Ry.* v. *Rogers* (1900) 111 Ga. 865, unless as a matter of fact it knows that the stock is not being cared for. *Chicago, Burlington & Quincy Ry. Co.* v. *Williams* (1901) 61 Neb. 608. It must also furnish the shipper, or his servant in charge, with the facilities for the care which it alone can supply. *Wabash, St. Louis & Pac. Ry. Co.* v. *Pratt* (N. Y. 1884) 15 Brad. 177. So in the principal case, though it cannot be asserted that, with the presence of the attendant, there was a duty on the carrier to supply treatment for the injured stock, yet, omitting the fact that the attendant forbid the unloading and treatment, and considering the carrier's general duty of care, the unusual necessity apparently caused by the accident, and the inability of the attendant to provide the treatment deemed necessary, it should hardly be considered a conversion under the rule that a bailee's act inconsistent with the terms of the bailment is such. Not every act which is a deviation from the terms of the bailment amounts to a

conversion. *Spooner v. Manchester* (1882) 133 Mass. 270; *Doolittle & Sherman* v. *Shaw* (1894) 92 Ia. 348. To constitute conversion the act must import an assertion of ownership inconsistent with the owner's dominion. *Disbrow* v. *Tenbroeck* (N. Y. 1855) 4 E. D. Smith 397; *Welch* v. *Mohr* (1892) 93 Cal. 371. So in the principal case, when the circumstance that the removal was effected in the face of a contrary insistence by the owner's representative is added, the act then takes on such a quality of conflicting right of dominion in the carrier, that the court should have held it a conversion.

TORTS—NUISANCE—NECESSITY OF NOTICE.—The defendant bought a building the cornice of which leaked so that the drip fell on the steps of plaintiff's premises. The weather caused it to freeze; plaintiff slipped and was injured. Defendant was ignorant of the nuisance and could not have discovered it in the exercise of ordinary care. *Held,* previous notice of the nuisance was necessary to warrant a recovery. *Neuman* v. *Steuer* (1909) 119 N. Y. Supp. 168.

The creator of a nuisance may be sued for damages without being notified of the injury caused by his acts; *Dunsbach* v. *Hollister* (N. Y. 1888) 49 Hun 352; *Exley* v. *So. Cotton Oil Co.* (1907) 151 Fed. 101; but to recover in an action against a person who merely suffers to continue a nuisance created by another, it is necessary to show that before the commencement of the action the defendant was notified of the existence of the nuisance, *Conhocton Stone R.* v. *B., N. Y. & E. R. R. Co.* (1873) 51 N. Y. 573, or at least that he should have had knowledge of the existence of the nuisance. *Pinney v. Berry* (1875) 61 Mo. 359. This is equitable, as otherwise the purchaser of property might be subjected to great injustice if he were made responsible for consequences of which he was ignorant, and for damages he never intended to occasion. *Johnson v. Lewis* (1839) 13 Conn. 303. There can be no injury, as the original wrongdoer continues liable notwithstanding his alienation. *Eastman* v. *Amoskeag Mfg. Co.* (1862) 44 N. H. 143. Previous notice to the owner of land to remove a nuisance is also necessary where one desires to abate a nuisance by self help, and the nuisance can only be abated by going on the land of another from which it proceeds, unless it appears that the owner was the creator of the nuisance, or that the nuisance is immediately dangerous to health, life, or property and the necessity for its removal urgent. *Jones* v. *Williams* (1843) 11 M. & W. 176. Where one proposes to abate a nuisance by acts not involving a trespass on his neighbor's land, no previous notice is necessary. *Lemmon* v. *Webb* (1894) 71 L. T. Rep. N. S. 647. The principal case is in accord with the authorities.